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HOW FAR AN ACT MAY BE A TORT BECAUSE OF THE WRONGFUL MOTIVE OF THE ACTOR.

AS a precedent Allen *v.* Flood[1] has been made harmless by the later decision in Quinn *v.* Leathem.[2] But certain *dicta* in the prevailing judgments in the earlier case, by reason of the prominence of the judges who gave them, may have a considerable and, as it seems to the present writer, a mischievous influence. He ventures, therefore, to point out what he conceives to be the fallacy of two of the most important of these *dicta.*

The first is this remark of Lord Watson:[3]

"Although the rule may be otherwise with regard to crimes, the law of England does not, according to my apprehension, take into account motive as constituting an element of civil wrong." The other is a statement by Lord Macnaghten:[4] "I do not think that there is any foundation in good sense or in authority for the proposition that a person who suffers loss by reason of another doing or not doing some act which that other is entitled to do or to abstain from doing at his own will and pleasure, whatever his real motive may be, has a remedy against a third person who, by persuasion or some other means not in itself unlawful, has brought about the act or omission from which the loss comes, even though it could be proved that such person was actuated by malice

[1] [1898] A. C. 1.
[2] [1901] A. C. 495.
[3] [1898] A. C. 92.
[4] [1898] A. C. 151.

towards the plaintiff, and that his conduct if it could be inquired into was without justification or excuse."

In opposition to these generalizations, the true rule, it is submitted, may be formulated as follows: The wilful causing of damage to another by a positive act, whether by one man alone, or by several acting in concert, and whether by direct action against him or indirectly by inducing a third person to exercise a lawful right, is a tort unless there was just cause for inflicting the damage; and the question whether there was or was not just cause will depend, in many cases, but not in all, upon the motive of the actor.

The motive to an act being the ultimate purpose of the actor is rightful if that purpose be the benefit of others or of himself, wrongful if the purpose be damage to another. An act may be a tort, notwithstanding the rightful motive of the actor, because the end does not justify the means. Such torts, however, are beyond the scope of the present paper. The soundness of the *dicta* quoted from Allen *v.* Flood must be tested by cases in which the actor in wilfully causing damage to another was dominated by a wrongful motive. We shall find that these cases fall into three groups: (1) Cases in which the wrongful motive has no legal significance, the actor, by general judicial opinion, being subject to no liability at law, however severe the judgment against him in the forum of morals; (2) Cases which have divided judicial opinion, some courts deciding that the actor should be charged because of his wrongful motive, others ruling that he should not be charged, notwithstanding his wrongful motive; (3) Cases in which it is generally agreed that the actor should be charged because of his wrongful motive.

First group. A defendant who has caused damage to the plaintiff and been actuated in so doing by the most reprehensible motives escapes liability if the plaintiff is suffering only the consequences of his own breach of duty. For example, the plaintiff refuses to leave the defendant's house, when requested, whereupon the defendant puts him out by force;[1] or the defendant removes the plaintiff's encroaching fence;[2] or his wrongful obstruction to the flow of a stream;[3] or turns the plaintiff's trespassing horse into the highway where it is lost or stolen.[4] It makes no difference that the defendant, in doing these acts, was taking

[1] Oakes *v.* Wood, 2 M. & W. 791, 794, *per* Parke, B; Kiff *v.* Youmans, 86 N. Y. 324 (*semble*); Brothers *v.* Morris, 49 Vt. 460.
[2] Smith *v.* Johnson, 76 Pa. St. 191.
[3] Clinton *v.* Myers, 46 N. Y. 511.
[4] Humphrey *v.* Douglass, 11 Vt. 22.

advantage of the opportunity to gratify a vindictive spirit, and would not have done them otherwise. It is still true that he was merely putting an end to the plaintiff's tort. Similarly, a creditor pursues his debtor with all the rigor of the law in order to ruin him, although he knows that with some indulgence he would realize more himself and enable his debtor to avoid bankruptcy;[1] or in a spirit of malevolence he sues a trespasser.[2] Here again the malevolent motive of the defendant is legally of no significance. The debtor and the tort-feasor were legally bound to pay and cannot claim damages because they were brought into court for the breach of their duty.[3] The action is refused in these cases, notwithstanding the reprehensible motive of the defendant, because the court could not without stultifying itself punish him for enforcing his absolute legal rights against his debtor or the wrongdoer.

In other cases the wrongful motive of the actor is ignored for a different reason. An English judge said from the bench to one of the parties: "You are a harpy, preying on the vitals of the poor." It was admitted that the words were false and spoken for the sole purpose of injuring the person addressed. The latter brought an action against the judge, but was unsuccessful.[4] A witness gave perjured testimony for the sake of defeating one of the parties to the suit. There was no redress against him at the suit of the person injured by his perjury.[5] It is believed to be for the public interest that neither judge, juror, party, counsel, nor witness should be called to account in a civil action for words spoken while filling those characters. The same absolute privilege extends to speeches in legislative assemblies.[6]

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[1] Morris *v.* Tuthill, 72 N. Y. 573; Friel *v.* Plummer, 69 N. H. 498; South Bank *v.* Suffolk Bank, 27 Vt. 505.

[2] Jacobson *v.* Von Boenig, 48 Neb. 80.

[3] Baron Parke's oft-quoted *dictum* (Stevenson *v.* Newnham, 13 C. B. 285, 297): "An act which does not amount to a legal injury, cannot be actionable because it is done with a bad intent" was given in a similar case. The defendant was sued for maliciously distraining for more rent than was due. But the count did not allege that the distress was excessive, that is, was unreasonably large for the rent actually due. If the defendant took by distress no more goods than might properly be taken, his motive in taking them was irrelevant. Hamilton *v.* Windolf, 36 Md. 301, is a similar case.

[4] Scott *v.* Stansfeld, L. R. 3 Ex. 220.

[5] Damport *v.* Simpson, Cro. El. 520.

[6] The head of an executive department of the government enjoys a similar immunity from a civil action for his official conduct. Spalding *v.* Vilas, 161 U. S. 483. Nor will an action lie for a malevolent removal of a subordinate official by a superior invested with the power of removal. Rosenbaun *v.* Gillian, 101 Mo. App. 126.

Anyone may speak or write defamatory words of another, and in the most contemptible spirit of vindictiveness, if he simply tells the truth. This rule works very harshly sometimes, but it is thought to be for the public welfare that men should appear in their true colors.[1]

An innocent man is subjected to a criminal prosecution by one who acted from the purest malevolence. Nevertheless, if he had reasonable grounds for believing the party prosecuted to be guilty, no action will lie against him for his malevolent conduct.[2] Here, again, the interest of the private individual must give way to the public good. It is for the interest of the community that all persons believed on reasonable grounds to be criminals should be prosecuted, whatever the motive of the person instigating the prosecution. In all these cases and others that might be mentioned the defendant escapes liability, not from any regard for him, but by reason of the paramount consideration of the public welfare.

Second group. There is much divergence of judicial opinion as to the liability of the owner of land for using it, not for any benefit to himself, but purely to the detriment of his neighbor. The typical illustrations of such conduct are the sinking of a well by the owner, not in order to get water for himself, but solely for the purpose of draining his neighbor's spring, or the erection by the owner on his land, but near the boundary, of an abnormally high fence, not for any advantage of his own, but merely to darken his neighbor's windows or to obstruct the view. In England it seems to be settled that the owner may act in this malevolent manner with impunity.[3] In France and Germany the owner is liable in tort in each case.[4] In this country there is a strange inconsistency in the reported decisions. In thirteen of the fifteen

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[1] Odgers, Lib. & Sl., 3d ed., 202. See the analogous case of Lancaster *v.* Hamburger (Ohio, 1904), 71 N. E. Rep. 289. By statute in Delaware, Florida, Illinois, Louisiana, Maine, Massachusetts, Nebraska, New York, Rhode Island, West Virginia, and possibly in a few other States, the truth of a libel is no defense to an action, unless it was published with a proper motive.

[2] Foshay *v.* Ferguson, 2 Den. 617; 1 Ames & Smith, Cas. on Torts 548, 549, *n.* 1.

[3] Mayor *v.* Pickles, [1895] A. C. 587; Capital Bank *v.* Henty, 7 App. Cas. 741, 766.

[4] Draining of spring: Badoit *v.* Andre, Cour de Lyon, April 18, 1856, Dalloz 56, 2, 199; Barré *v.* Guilhaumon, Cour de Montpellier, July 16, 1866, Sirey 67, 2, 115 (*semble*); Forissier *v.* Chavrot, Cour de Cassation, June 10, 1902, Sirey, 1903, 1, 11; G *v.* F., O. A. G. zu Jena, Nov. 29, 1878, 35 Seuff. Arch. No. 273 (*semble*). Spite fence: Doerr *v.* Keller, Cour de Colmar, May 2, 1855, Dalloz 56, 2, 9; G. *v.* F., O. A. G. zu Jena, Nov. 29, 1878, 35 Seuff. Arch No. 273 (*semble*); Marcus *v.* Bose, O. L. G. zu Darmstadt, June 5, 1882, 37 Seuff. Arch. No. 292 (*semble*).

jurisdictions in which the question has arisen the courts have declared that the malevolent draining of a neighbor's spring is a tort.[1] On the other hand in six of the ten states in which actions have been brought for the malevolent erection of a spite fence, the opinion of the court was against the plaintiff.[2]

That the conduct of the defendants in these cases is unconscionable no one will deny. That they should be forced to make reparation to their victims, unless paramount reasons of public policy forbid, would seem equally clear. But the absence of such reasons is evident from the fact that in France and Germany and so many of our states the courts have allowed reparation, and from the further fact that in at least six[3] states statutes have been passed making the erection of spite fences a tort.[4] Such legislation is

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[1] Katz *v.* Walkinshaw, 141 Cal. 116; Cohen *v.* La Canada Co., 142 Cal. 437; Roath *v.* Driscoll, 20 Conn. 533, 540, 543, 544; Barclay *v.* Abraham, 121 Ia. 619; Gagnon *v.* French Co. (Ind. Ap. 1904), 72 N. E. Rep. 849; Chesley *v.* King, 74 Me. 164; Stevens *v.* Kelley, 78 Me. 445, 452; Greenleaf *v.* Francis, 18 Pick. 117, 119 (*semble;* but see Walker *v.* Cronin, 107 Mass. 555, 564, and Plant *v.* Woods, 176 Mass. 492, 499); Stillwater Co. *v.* Farmer, 89 Minn. 58; Springfield Co. *v.* Jenkins, 62 Mo. Ap. 74; Bassett *v.* Salisbury Co., 43 N. H. 569; Swett *v.* Cutts, 50 N. H. 439, 447; Franklin *v.* Durgee, 71 N. H. 186; Smith *v.* Brooklyn, 18 N. Y. Ap. Div. 340, 160 N. Y. 357, 361; Forbell *v.* New York, 164 N. Y. 522; Wyandot Co. *v.* Sells, 3 Oh. N. P. 210 (question left open in earlier case in Supreme Court, Frazier *v.* Brown, 12 Oh. St. 299, 303, 304); Wheatley *v.* Baugh, 25 Pa. St. 528, 533; Lybe's App., 106 Pa. St. 626, 632; Williams *v.* Ladew, 161 Pa. St. 283, 287, 288; Miller *v.* Blackrock Co., 99 Va. 747 (*semble*). The only decisions to the contrary are in Vermont and Wisconsin. Chatfield *v.* Wilson, 28 Vt. 49; Huber *v.* Merkel, 117 Wis. 355.

[2] Russell *v.* State (Ind. Ap. 1904), 69 N. E. Rep. 482; Bordeau *v.* Greene, 22 Mont. 255; Brostrom *v.* Lampp, 179 Mass. 315; Mahan *v.* Brown, 13 Wend. (N. Y.) 261; Auburn Co. *v.* Douglas, 9 N. Y. 447, 450 (*semble*); Adler *v.* Parr, 34 N. Y. Misc. Rep. 482; Pickard *v.* Collins, 23 Barb. (N. Y.) 444; Letts *v.* Kessler, 54 Oh. St. 73 (reversing S. C. 7 Oh. C. C. 108); Metzger *v.* Hochreim, 107 Wis. 267. The opposite view obtains in Michigan, New Hampshire, Oklahoma, and Pennsylvania. Burke *v.* Smith, 69 Mich. 380; Flaherty *v.* Moran, 81 Mich. 52; Kirkwood *v.* Finegan, 95 Mich. 543; Horan *v.* Byrnes, 72 N. H. 93; Smith *v.* Speed, 11 Okla. 95; Haverslick *v.* Byrnes, 33 Pa. St. 368 (*semble*).

[3] Connecticut, Maine, Massachusetts, New Hampshire, Vermont, and Washington. There is a similar statute in Wisconsin against the malevolent draining of a neighbor's spring.

[4] The courts which deny compensation for the damage inflicted by a spite fence proceed upon the assumption that the owner of land, by virtue of his ownership, has an absolute right to erect such a fence. But there are many limitations upon the right of ownership at common law, and, it is submitted, there is no difficulty in principle in limiting an owner's right so far that he shall not be permitted to use his land in a particular way with no other purpose than to damage his neighbor. If, in truth, the owner's right is absolute in this respect, how can it be taken away from him by statute? Such a statute was held unconstitutional in Huber *v.* Merkel, 117 Wis. 355. See also Western Co. *v.* Knickerbocker, 103 Cal. 111, 115. But the opposite view was taken in Rideout *v.* Knox, 148 Mass. 368, and Karasek *v.* Peier, 22 Wash. 419.

likely to spread, so that ultimately the cases in this second group will belong in the third group.[1]

Third group. Coming now to the cases in which an actor's liability for intentional damage to another is determined by the motive with which he acted, let us take first the case of malicious prosecution. The plaintiff, an innocent man, has been subjected to a criminal prosecution for theft. The defendant, who instituted the prosecution, although having no reasonable ground for his belief, did honestly believe the plaintiff to be guilty of the theft. Is the defendant liable for the damage suffered by the plaintiff? If he acted from a sense of public duty to bring a supposed criminal to justice, then, blunderer though he was, his conduct is justifiable. If, on the other hand, his object was to punish the plaintiff for marrying the woman whom he himself had hoped to make his wife, or to satisfy some other grudge, his conduct was inexcusable. Here, certainly, the motive or object of the actor converts an act otherwise lawful into a tort. We may suppose again that a defendant publishes a fair and accurate report of a judicial proceeding which contains matters defamatory to the plaintiff, a minister. If this is done simply by way of giving news to the public, the plaintiff has no remedy. He has to suffer for the general good of the community. If, however, the defendant, solely from ill-will to the plaintiff, should print the report for the purpose of discrediting the plaintiff as a candidate for a call to a certain church, the plaintiff could charge him in tort for the damage caused by the publication.[2] Here also it is the defendant's motive or object which makes him a wrongdoer.

A French case furnishes another illustration. The plaintiff by planting certain crops had attracted a great amount of game to his country estate, and invited several of his friends from

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[1] The discontinuance of a service at will or the refusal to employ a man, to make a lease to him, to buy his goods, to lend him money, to recommend him as a servant, will give him no cause of action, however great the damage to him or however malevolent the attitude of the party refusing to gratify his wish. Allen *v.* Flood, [1898] A. C. 100, 152, 172; London Co. *v.* Horn, 206 Ill. 493, 504; Heywood *v.* Tillson, 75 Me. 225, 230; Collins *v.* American Co., 68 N. Y. App. Div. 639. But these and similar cases are foreign to the present discussion, which relates to possible torts. The refusals just mentioned cannot be torts, for they are not acts but failures to act. They would not be mentioned but for the fact that this fundamental distinction between a malevolent act and a malevolent non-feasance appears to have been overlooked by several of the judges in Allen *v.* Flood, *supra*, 100, 152, 172.

[2] Stevens *v.* Sampson, 5 Ex. Div. 53, Odgers Lib. & Sl. (3d ed.) 292.

Paris for a day's hunt. The neighbor of the plaintiff, irritated by the latter's success, ordered his servants to make so much noise on his own land as to frighten away the game and so spoil the day's sport. He was made to pay damages to the plaintiff.[1] It is obvious, however, that if the neighbor, while hunting himself, had disturbed the hunt of the plaintiff by the noise of his dogs and guns, no action would have lain against him. The neighbor had just as much right to hunt as the plaintiff. Lord Holt took the same distinction in a similar English case.[2] His language is much to the point: "Suppose the defendant had shot in his own ground, if he had occasion to shoot, it would have been one thing; but to shoot on purpose to damage the plaintiff is another thing and a wrong."[3]

Two decisions, one in France and one in Belgium, are especially instructive. In each case an employer threatened to discharge his employees if they traded with the plaintiff. In the one case the plaintiff kept a saloon which had exercised a demoralizing effect upon the defendant's workmen. The latter's prohibition against his men frequenting the plaintiff's saloon was held justifiable as a reasonable measure of discipline.[4] In the other case the plaintiff was a political rival of the defendant, and the latter used his workmen as a means of ruining the plaintiff's business. In this case judgment was given for the plaintiff.[5] It will be observed that in each of these cases the damage to the plaintiff was caused by the act of a single individual, and not by a combination of persons; that in each case the defendant used neither fraud nor force, but merely the pressure of a threatened loss of place, and that in each case the workmen were under no obligation to trade with the plaintiff. The two cases illustrate in a very convincing manner how the motive with which an act is done may determine its lawfulness or unlaw-

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[1] Prince de Wagram *v.* Marais, Cour de Paris, Dec. 2, 1871, Dalloz 73, 2, 185.

[2] Keeble *v.* Hickeringill, 11 East 574, *n.*, Holt 14, 3 Salk. 9, 11 Mod. 74, 130 S. C.

[3] 11 Mod. 70.

[4] Reding *v.* Kroll, Trib. de Luxembourg, Oct. 2, 1896, Sirey 1898, 4, 16. "Les défendeurs auraient certainement abusé de leur droit, et, dès lors, commis un acte quasi-délictueux, s'il était établi, comme le demandeur l'affirme en termes de plaidoirie, que leur défense ne repose sur aucune nécessité de discipline ouvrière, qu'elle a été portée malicieusement et par pur esprit de vengeance."

[5] Dapsens *v.* Lambret, Cour d'Appel de Liège, Feb. 9, 1888, Sirey 1890, 4, 14. "Attendu qu'on ne saurait admettre qu'il soit permis, même par des actes licites absolument parlant, de ruiner un citoyen sans autre intérêt ou mobile que celui de la vengeance; qu'alors le summum jus devient la summa injuria."

fulness. A similar distinction has been made in cases in this country brought against employers who induced their workmen not to trade with the plaintiff.[1]

Similarly, whether employees, who, by threatening to strike, induce an employer not to engage the plaintiff or retain him in a service terminable at the employer's will, are guilty of a tort, may depend upon the motive of the defendants. If they objected to working with the plaintiff because his incompetency would expose them to danger, or because of his depraved character, no action would lie against them.[2] If on the other hand their motive was to wreak their vengeance upon him for his conduct towards them, they must pay the damages inflicted upon him by their conduct.[3]

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[1] Chipley *v.* Atkinson, 23 Fla. 206, 216–217; Graham *v.* St. Charles Co., 47 La. An. 214, 1657; Internat. Co. *v.* Greenwood, 2 Tex., Civ. Ap. 76. The decision in Payne *v.* Western Co., 13 Lea (Tenn.) 508, is *contra*, but two of the five judges dissented, and the effect of the case as a precedent is nullified by statute. Shannon's Code, Supp. 285. Raycroft *v.* Tayntor, 68 Vt. 219, is distinguishable. The defendant having quarrelled with the plaintiff was warranted in objecting to his presence upon his land, although his objection required one of his own employees to choose between continuing in his service, and declining to employ the plaintiff as an assistant. The decision in Heywood *v.* Tillson, 75 Me. 225, is not open to question, for the defendant's conduct was a legitimate mode of protecting the interests of himself and his employees. But some of the *dicta* of the court are unsatisfactory and at variance with the decision in Chesley *v.* King, 74 Me. 164.

[2] Giblan *v.* Nat. Union, [1903] 2 K. B. 600, 617, 619; Heywood *v.* Tillson, 75 Me. 225, 232; Commonwealth *v.* Hunt, 4 Met. (Mass.) 111, 130; Nat. Prot. Ass'n *v.* Cumming, 170 N. Y. 315.

[3] Giblan *v.* Nat. Union, [1903] 2 K. B. 606; Joost *v.* Syndicat des Imprimeurs, Cour de Cassation, June 22, 1892, Sirey 93, 1, 41; Joost *v.* Syndicat, Cour d'Appel de Chambéry, March 14, 1893, Sirey 93, 2, 139; Oberle *v.* Syndicat des Ouvriers, Cour d'Appel de Lyon, March 2, 1894; Dalloz 94, 2, 305; Monnier *v.* Renaud, Cour de Cassation, June 9, 1896, Dalloz 1896, 1, 582. In Giblan *v.* Nat. Union, *supra*, Romer, L. J., said, pp. 619–620: "In my judgment, if a person who, by virtue of his position or influence, has power to carry out his design, sets himself to the task of preventing, and succeeds in preventing, a man from obtaining or holding employment in his calling, to his injury, by reason of threats to or special influence upon the man's employers, and the design was to carry out some spite against the man, or had for its object the compelling him to pay a debt, or any similar object not justifying the acts against the man, then that person is liable to the man for the damage consequently suffered." In Joost *v.* Syndicat, *supra*, Sirey 93, 2, 139, the court said: "Attendu que sans doute les ouvriers syndiqués avaient de leur côté le droit de se mettre en grève; mais qu'il n'est permis à personne d'abuser de son droit; qu'il y a abus d'un droit toutes les fois que celui qui prétend l'exercer n'agit que dans le but de nuire à autrui sans aucun intérêt pour lui même." In Monnier *v.* Renaud, *supra*, the case turned upon the point whether the defendant had been promoting "un intérêt professionel" or had been influenced by "un sentiment de malveillance injustifiée."

As a rule, however, the ultimate object of a labor union in excluding an employee from work by pressure upon the employer, or in injuring the business of an employer

In the case supposed by several of the judges in Allen *v.* Flood,[1] the liability of the cook, who induced the master to dismiss the butler by threatening to leave himself if the butler were retained, should depend upon the motive of the cook. If the two were thrown together, and if the butler by his character or personality was distasteful to the cook, the latter, with a view to his own interest would be justified in calling upon the master to choose between them. If, on the other hand, the cook, having no objection to the butler as a companion, procured his dismissal from pure malevolence, his conduct would be tortious.[2]

An Illinois decision[3] illustrates the legal significance of the motive of a defendant who caused damage to the plaintiff by moral coercion upon the conduct of a third person. The defendant, an insurance company, had contracted by its policy to indemnify a manufacturer against liability for claims for injuries to his employees. The plaintiff was an employee who had been injured in the course of his employment. The defendant company recognized its liability, but disputed the amount demanded and threatened to have the employee discharged unless he accepted in full satisfaction the small amount offered. The employee refusing to yield, the company induced the employer to discharge the employee by threatening to exercise its right to cancel the policy. The plaintiff recovered substantial damages. The court said, however, that if the company had procured in this manner the dismissal of an employee, who by his bad habits or incompetency was likely to increase the risk of the company, such conduct would have been justifiable as a reasonable measure of self-protection.

In a Louisiana case the plaintiff, an innkeeper who was also an assessor, had irritated the defendants by what they conceived to be an excessive valuation of their property. Purely to avenge this

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by the persuasive or coercive boycott, is not the damage to their victim, but the advancement of the cause of labor. This motive, of course, is commendable. In the great majority of labor cases, therefore, the question whether the members of a labor union are guilty of a tort is a question, not of motive, but of the legal validity of the means adopted for effectuating their motive; and this question must be answered by a careful weighing of considerations of public policy.

[1] [1898] A. C. 36, 57, 138–139, 165–166.

[2] The case seems to be covered by the following language of Mr. Chief Justice Holmes: "We cannot admit a doubt that maliciously and without justifiable cause to induce a third person to end his employment of the plaintiff, whether by false slanders or successful persuasion, is an actionable tort." Moran *v.* Dunphy, 177 Mass. 485, 487.

[3] London Co. *v.* Horn, 206 Ill. 493.

supposed grievance they persuaded certain commercial travellers to discontinue their patronage of the plaintiff's hotel. They were compelled to pay him substantial damages.[1]

To divert to one's self the customers of a rival tradesman by the offer of goods at lower prices is, in general, a legitimate mode of serving one's own interest and justifiable as fair competition. If, however, a man should start an opposition shop, not for the sake of profit for himself, but, regardless of loss to himself, for the sole purpose of driving the plaintiff out of business and with the intention of retiring himself immediately upon the accomplishment of his malevolent purpose, would not this wanton causing of damage to another be altogether indefensible and a tort? Such a case is not likely to arise, but several judges have expressed the opinion that the defendant in such a case would have to make reparation.[2]

A close friend of a creditor advises him in good faith, that he is likely to lose his claim unless he proceeds without delay to collect it. The creditor acts on the advice, presses his claim, and the debtor is ruined, whereas, if he had received indulgence for a short time, an expected favorable turn in his affairs would have enabled him to weather the storm. Grievous as this loss is, he cannot hold the creditor's adviser responsible. But would there be any doubt as to his responsibility if he had given the same advice with full knowledge of the debtor's situation and for the sole purpose of ruining him?

The illustrations already given can hardly fail to convince the reader that Lord Macnaghten's *dictum*, quoted at the opening of this paper, is untenable, and that there are many torts arising from the defendant's inducing a third person to act in such a way as to damage the plaintiff, although the defendant used neither fraud, force, nor defamation, and although the conduct of the third person was altogether lawful. The instances mentioned prove also how often the tortious quality of an act depends upon the motive of the actor. But other examples may be suggested.

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[1] Webb *v.* Drake, 52 La. An. 290. Delz *v.* Winfree, 80 Tex. 400, is a similar case.

[2] Lord Coleridge in Mogul Co. *v.* McGregor, 21 Q. B. D. 544, 553; Lord Bowen, s. c. 23 Q. B. Div. 598, 618; Lord Morris, s. c. [1892] A. C. 49; Lord Field, s. c. 52; Lord Halsbury in Allen *v.* Flood, [1898] A. C. 1, 77; opinion of court *per* Wells, J., in Walker *v.* Cronin, 107 Mass. 555, 564; Holmes, J., in May *v.* Wood, 172 Mass. 11, 15; opinion of court *per* Hammond, J., in Plant *v.* Wood, 176 Mass. 492, 498; Taft, J., in Moores *v.* Bricklayers Union, 23 Oh. W. L. Bull. 48, 51, 52. But see *contra* Passaic Works *v.* Ely, 105 Fed. Rep. 163, Sanborn, J., diss.; Auburn Co. *v.* Douglass, 9 . Y. 444, 450, *per* Selden, J.; Nat. Ass'n *v.* Cumming, 170 N. Y. 315, 326.

To put poisoned food upon one's own land in order to kill a skunk gives no cause of action to one's neighbor, although the neighbor's dog eats the food and dies from the poison. But it has been decided in South Carolina that the neighbor may have an action if the defendant, knowing that the plaintiff's dog was in the habit of coming upon his premises, exposed the poisoned food for the express purpose that the dog might eat it and die.[1]

To deposit rubbish in the highway would not ordinarily subject the depositor to an action at the suit of a private individual; but if the defendant placed it there in order to cause loss to the plaintiff, who was bound by contract with the town to keep the highway in good condition, we should all agree with the Connecticut court[2] that he would have to make good the loss to the plaintiff.

To kill a man whose life is insured, although a crime, is not, without more, a tort against the insurance company.[3] But the crime would be also a tort to the company if committed for no other purpose than to inflict loss upon the latter.[4]

Other instances in which the success of the plaintiff depends upon the wrongful motive of the defendant doubtless will occur to the ingenious reader. He will find, however, that, in these new instances as well as in those suggested in this paper, it is for the plaintiff to allege and prove this wrongful motive. Generally the allegation must be made in the declaration. But in the case of malevolent publication of reports of judicial proceedings this allegation comes in the reply to the defendant's answer. Those who maintain that the law does not regard motive as an element in a tort are wont to distinguish this case on the ground that the wrongful motive is simply a means of destroying the defense of privileged communication. But this reasoning seems specious rather than sound. For, when the facts of the particular case are developed, it is still true that the defendant is guilty of a tort, and the plaintiff wins solely because the defamation was induced by a wrongful motive.

As the plaintiff succeeds in certain cases of wilful damage by the defendant solely by proof of the actor's wrongful motive, so the defendant sometimes wins, notwithstanding he has wilfully

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[1] Cobb *v.* Cater (S. Ca. 1901), 38 S. E. Rep. 114.

[2] McNary *v.* Chamberlain, 34 Conn. 384. [3] Ins. Co. *v* Brame, 95 U. S. 754.

[4] Conn. Co. *v.* N. Y. Co., 25 Conn. 265, 276; McNary *v.* Chamberlain, 34 Conn. 384, 388; Gregory *v.* Brooks, 35 Conn. 437, 446; 2 Mugdan, Die Gesammt-Materialien zum B. G. 407.

damaged the plaintiff, solely by proof of a benevolent motive. One who has crossed the plaintiff's land in order to catch a train cannot urge his motive of self-interest as a justification. But if he crossed the land in order to rescue a child playing on the track from imminent peril of being run over by a train, his benevolent motive will be a full defense to an action of trespass.

Occasionally the authorities leave us in the dark as to whether a particular case is to be grouped with those in which the plaintiff must establish a malevolent motive or with those in which the defendant must prove a benevolent motive. Must a plaintiff, for example, in counting against a defendant for inducing a young woman to break her contract to marry the plaintiff allege also that the defendant acted from a malevolent motive, or at least from a selfish motive, or is the question of the motive properly to be raised only by the defendant's allegation that he acted from a benevolent interest in the welfare of his daughter? As a matter of principle it seems to the writer that the plaintiff states a *prima facie* case, and makes a good count by alleging simply that the defendant induced the third person to break her contract, *i. e.*, to do a legal wrong. If this is a correct view, the case has no bearing upon the subject of this paper. Otherwise it is another instance in which a wrongful motive may make an act a tort.

If this essay has accomplished its purpose, it is made clear that the *dictum* that our law never regards motive as an element in a civil wrong is as far from the truth as would be the statement that malevolently to damage another is always a tort. The truth lies in the middle. In certain cases, in spite of the wrongful motive of the actor, malevolently to damage another is lawful, either because the act is merely the exercise of an absolute legal right, or because it is justified by paramount considerations of public policy. Except in such cases, however, wilfully to damage another by a positive act and from a spirit of malevolence is a tort, even though the same act, if induced by a rightful motive, would be lawful.[1]

J. B. Ames.

[1] The reader may have remarked that, except in a quotation, the words "malice," "malicious," and "maliciously" have not been used. Malice, as used in the books, means sometimes malevolence, sometimes absence of excuse, and sometimes absence of a motive for the public good. If so "slippery" a word, to borrow Lord Bowen's adjective, were eliminated from legal arguments and opinions, only good would result.